Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,
Petitioners,

-against-

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARVIN MENAKER
Texas Bar #13930000
Lyndon Plaza
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ATTORNEY FOR PETITIONER

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A Division of Triangle Pacific Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner herein respectfully prays that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on January 21, 1997.

QUESTIONS PRESENTED

An employee was discharged without warning for giving a false reason for requesting an unpaid hour off. The collective bargaining agreement required "just cause" for discharge and permitted discharge without prior warning for "immoral conduct." An arbitrator found it unreasonable to construe what she did as "immoral conduct" and reduced the penalty to a suspension. the Fifth Circuit held that lying was immoral conduct by definition and ordered her discharge reinstated. The questions presented are:

1. WHETHER IN AN ACTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, IT IS PERMISSIBLE FOR A COURT TO SET ASIDE AN ARBITRATOR'S DECISION BECAUSE IT BELIEVES THE ARBITRATOR MISREAD THE COLLECTIVE BARGAINING AGREEMENT.
2. WHETHER THERE IS A CONFLICT AMONG THE CIRCUIT COURTS IN APPLYING THE FEDERAL POLICY OF ENFORCING LABOR ARBITATION AWARDS.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Fifth Circuit are set out below.

PETITIONER:

UBC
Southern Council of Industrial Workers,
Local Union No. 2713
c/o Mr. Ed Jenkins, Counsel Representative
2737 N. Garland Road #15
Garland TX 75040

ARBITRATION GRIEVANT:

Sheila Dixon
Rt 2 Box 1156
Center TX 75935

RESPONDENT:

Bruce Hardwood Floors, a Division
of Triangle Pacific Corporation
16803 Dallas Parkway
Dallas TX 75248

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PUBLICATION

Black's Law Dictionary 7,9

OPINIONS BELOW

The Award of Arbitrator Harr is unreported, but is reproduced in full at Appendix A.[1] The District Court's opinion is unreported, but is reproduced in full at Appendix B. The decision of the Court of Appeals is reported at 103 F.3d 449 (5th Cir. 1997), and reproduced in full at Appendix C.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 21, 1997. (App. C). A timely Petition for Rehearing was denied on February 27, 1997. (App. D). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1). This corrected

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[1] Materials appearing in the Appendix to this Petition will be referred to as App. ___, specific pages under the Appendix are referred to as App. a1, etc.

version of the Writ is filed within the sixty-day time limit set out in the letter from the Supreme Court dated May 22, 1997.

STATUTORY PROVISIONS

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. §173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desireable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

In this case the Court of Appeals vacated an arbitrator's award because it disagreed with his interpretation of a collective bargaining agreement (CBA). The facts as found by the arbitrator, and reviewed by the District Court, are undisputed.

Sheila Dixon worked for respondent

Bruce Hardwood Floors for fourteen years until she was discharged on Saturday, January 14, 1995, because she gave a false excuse.

The power at her home had been turned off on the Thursday night before she was fired because she had not paid her bill. She planned to pay the bill when she received her pay at lunch time on Friday. When she called the electric company during her morning break on Friday, she discovered that unless she paid the bill immediately, the power could not be turned on until Monday. Panicked, at 11:00 a.m., she asked for an hour's unpaid time off for personal business. Her supervisor demanded to know the nature of the business. Embarrassed by her delinquency and concerned that she would not be given the time off, she said that she needed to

get her truck to her daughter so that she could use it to go to the doctor. After consultation, her supervisor said that she could take the time off, but as an unexcused (i.e. unpaid) absence. She clocked out, paid her bill and returned to work in 45 minutes. The next day the Company discovered the true reason for her absence and discharged her immediately on the grounds that she had obtained leave from her job under false pretenses.

Ms. Dixon's employment was governed by a CBA that provided for final and binding arbitration. (App. e3). Under Article 24 of that CBA, discharge was permitted only for "just cause." (App. e5). Under Article 24, Section 2 (App. e6), the CBA required progressive discipline, i.e., a warning for a first offense, then suspension, and finally discharge only

after the fourth offense, for listed or similar offenses. It did permit immediate discharge for twenty listed serious offenses, such as "serious violation of safety rules or inspections" or "being the aggressor in a fight on company property." Among those listed offenses were (15) "punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports" and (16) "stealing, immoral conduct, or an act on the Company premises intended to destroy property or inflict bodily injury."

Ms. Dixon filed a grievance. At arbitration, the Company took the position that immediate discharge, without warning, was permitted because her conduct violated (15) and (16). The Company also argued that Grievant's conduct violated the CBA

provision which provided for loss of seniority (but not discharge) for obtaining leave of absence under false pretenses. (App. e2).

After hearing, Arbitrator Harr concluded that the Company's position that the CBA permitted immediate discharge was "to say the least, unreasonable." (App. a8). Based on testimony that no other employee had been discharged for the same reason as Ms. Dixon, he concluded that the discipline imposed should be reduced to a ten-day suspension and that she should be reinstated and made whole for any loss in excess of the ten-day suspension. (App. a9).

The Company filed suit seeking to vacate the arbitrator's award and the Union filed suit seeking enforcement of the Award. Both parties moved for summary

judgment. The trial court agreed with the Arbitrator that the Company's position was unreasonable and granted the Union's Motion for Summary Judgment. (App. b8). The Court also concluded that the refusal of the Company to abide by the arbitration award was "without justification" and ordered the Company to pay the Union reasonable attorney's fees.

A divided Court of Appeals reversed and ordered that Ms. Dixon's discharge be reinstated. (App. c5). It relied on its prior decisions that "[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected." By definition, the Court said lying is "immoral conduct," citing *Black's Law Dictionary*. (App. F). The CBA permitted the

employer to discharge an employee immediately for "immoral conduct." In refusing to apply this provision, the Court said, "the arbitrator exceeded the expressed limitations of his contractual mandate." The order for attorney's fees was, naturally, also reversed. Judge Benavides dissented.

REASONS FOR GRANTING THE WRIT

The decision below is plainly contrary to this Court's admonition that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *International Paperworkers Union AFL-CIO v. MISCO, Inc.*, 484 U.S. 29, 38-9 (1989). The arbitrator here, acting within the scope of his authority to

determine whether the grievant was discharged for "just cause," construed that the contractual provision permitting immediate discharge for "immoral conduct" did not include a discharge for lying. Relying on *Black's Law Dictionary*, the Court below said that lying was immoral conduct, overturned the Arbitrator's construction [2] and set aside his award. This was not a mere "misapplication of a properly stated rule of law" but a total disregard for the decisions of this Court.

When a court concludes that an arbitrator's decision is contrary to an

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[2] Even that reliance was mistaken. Black's Law Dictionary defines immoral conduct as "morally evil; impure; obscene; unprincipled; vicious; or dissolute... indicative of corruption, indecency, depravity and dissoluteness... or shameless conduct showing moral indifference to opinions of respectable members of the community..." Black's Law Dictionary (751 6th Ed. 1990). (App. F).

express contractual provision, it is really saying that it reads that provision differently than the arbitrator did. But, as this Court has said:

> It is the arbitrator's construction which was bargained for...and the courts have no business overruling him because their interpretation is different from his.

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

To permit, as the Fifth Circuit's rule does, a court to reverse an arbitrator's decision because the court believes that he read an "express provision" differently than the court is to destroy arbitration's utility as a final and binding method of resolving contractual disputes and eliminating them as a cause for industrial strife.

Even if it is assumed, incorrectly, that the Court of Appeals properly overruled the Arbitrator's construction of

the words "immoral conduct," there is an irreconcilable conflict among the circuits. The CBA here both (1) required that there be "just cause" for discharge and (2) distinguished between serious offenses such as "immoral conduct" for which no prior warning was required and less serious offenses which required progressive discipline. Many, if not most, American CBA's list specific offenses and also require just cause for discharge. The question of an arbitrator's authority to set aside a discharge of an employee who committed a listed offense is a recurring question of law on which the circuits are squarely in conflict.

In this case, the Fifth Circuit held that the Arbitrator was required to sustain the discharge even in the absence

of a finding of "just cause" because Grievant committed what the Court thought was a listed offense. This was also its conclusion in *Delta Queen Steamboat Co. v. District 2*, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 112 L.Ed2 114, 115, (1990). The First Circuit came to a similar conclusion in *S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827 (1st Cir. 1988, *cert. denied 488 U.S. 992* (1988). The Third, Sixth, Seventh and Eighth Circuits have held, to the contrary, that a finding that an employee has committed an offense listed as grounds for discharge does not deprive an arbitrator of authority to set aside the discharge if he concludes that, for procedural or other reasons, there was not just cause for discharge. *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514

(8th Cir. 1996, *no writ*). Even though the contract gave *Coca-Cola* the right to enforce work rules, it held that where there was a finding of no "just cause" by the arbitrator, the arbitrator's decision had to be enforced. *See also Kewanee Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1982, *no writ*).

Similarly, in *AOI, Div. of Apogee Coal v. Dist. 12, U.M.W.A.*, 85 F.3d 1289 (7th Cir. 1996, *no writ*), the Court said it would set aside an award:

> ...only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract... (emphasis in original).

Citing Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 184-85 (7th Cir. 1985), *cert. denied* 475 U.S. 1010 (1986).

In *Typographical Union v.S Chicago Sun-Times*, 935

F.2d 1501 (7th Cir. 1991, *no writ*), the Court pointed out that on judicial review the court is forbidden to substitute its own interpretation, even if convinced the arbitrator's interpretation is wrong.

In *Tanoma Mining Co. v. Local 1269*, 896 F.2d 745 (3rd Cir. 1990, *no writ*), a District Court set aside an arbitrator's decision on the grounds that the arbitrator disregarded the principles of agency law in holding that a new company was bound by an agreement. The Third Circuit noted that its review of the arbitrator's factual finding is not whether those findings were supported by the weight of the evidence, or even whether they were clearly erroneous. All that was required is some support in the record. When the Court finds some support, the inquiry is over.

In the same vein, in *News America Publications v. Local 103*, 918 F.2d 21 (3rd Cir. 1990, *no writ*), the Court held that there must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of the award, *citing NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756 (3rd Cir. 1975, *no writ*). *See also UTU Local 1589 v. Suburban Transit Corp.*, 51 F.3rd 376 (3rd Cir. 1995, *no writ*).

The conflict is most clearly shown by a series of decisions within the Sixth Circuit involving this same company and a virtually identical CBA. In the first case, in the Middle District of Tennessee, Bruce Hardwood had discharged an employee who committed the offense of "being insubordinate," listed as serious in the

CBA. An arbitrator set aside the discharge because it was not for just cause. The district court set aside the award, acknowledging a conflict with the Eighth Circuit. *Carpenters v. Bruce Hardwood Floors*, 784 F.Supp. 1345 (DC MTenn 1992), *rev'd* 8 F.3d 1104 (6th Cir. 1993).

In the second case, in the Western District of Tennessee, an arbitrator found that a discharged employee was in fact guilty of one of the listed serious offenses, "sleeping on duty," but found that the discharge was not for just cause. The district court set aside the award. The Sixth Circuit, however, reversed, holding that the arbitrator could apply the "just cause" standard in the agreement. The Court also found that the earlier Middle District case was wrongly decided. *Bruce Hardwood Floors v. Carpenters*, 8

F.3d 1104 (6th Cir. 1993, *no writ*). In these cases, unlike the case at bar, the CBA specifically provided that discipline would be applied "in a fair and equal manner to all offenders" and the company would take into account "mitigating circumstances" but the differences are immaterial. *Id.* at 1105. Those provisions merely restated principles encompassed within "just cause" that would apply in their absence.

The question of an arbitrator's authority under CBA's requiring just cause for discharge and also listing dischargeable offenses is present under almost all CBA's. Almost all of the circuits have got the answer to that question right, applying the principles established by this Court. The Fifth and First Circuits have not. The number of

cases involving the issue on which the circuits are in conflict requires that this court resolve the conflict. It is essential to the maintenance of the grievance and arbitration system that has served so well to implement this nation's labor policy that the policy announced be followed in practice, not just in form.

This Court has denied *certiorari* in many of the circuit court cases in which this trend of conflict in the circuits has existed, presumably because in each case the principles enunciated by this Court have been ritually and correctly recited before being misapplied in a particular case. But when this occurs again and again, it is appropriate and indeed necessary that this Court grant review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

MARVIN MENAKER
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Lyndon Plaza
10925 Estate Lane Suite 215
Dallas TX 75238
214/340-7788
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of JULY, 1997, a true and correct copy of the foregoing Petition for Writ of Certiorari was sent to Mr. Edward Bograd, Blair Conaway Bograd & Martin, P.A., 221 South Tryon Street, Charlotte NC 28202-3247, via regular mail.

MARVIN MENAKER

APPENDIX A

IN THE MATTER OF THE ARBITRATION BETWEEN

BRUCE HARDWOOD FLOORS
A TRIANGLE PACIFIC COMPANY
Center, Texas

and

FMCS No. 95-9822
Sheila Dixon,
Grievant

LOCAL UNION 2713
SOUTHERN COUNCIL OF INDUSTRIAL WORKERS
chartered by

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

APPEARANCES:

For the Company:

Edward Bograd, Esq.
Blair Conaway Bograd & Martin, P.A.
Attorneys at Law
221 South Tryon Street
Charlotte, North Carolina 28202-3247

For the Union:

Ed Jenkins
Council Representative
Southern Council of Industrial Workers
2737 N. Garland Road #15
Garland, Texas 75040

INTRODUCTION:

Pursuant to the Collective Bargaining Agreement between the parties, effective November 1, 1993, Article 9, the

undersigned was selected as arbitrator to hear and render a decision in the above referenced grievance through the procedures of the Federal Mediation and conciliation Service.

Hearing was held in Center, Texas, on April 19, 1995. Both parties were represented by learned and capable counsel. The parties were given the opportunity to make opening statements, present evidence and exhibits, present and cross examine witnesses and make closing arguments.

Initially, the parties stipulated that there was no question concerning the arbitrability of the grievance and that the grievance was properly before the arbitrator for a decision.

At the close of the hearing the parties requested and were granted time in which to file post hearing briefs. Both parties briefs were timely received by the Arbitrator, thus closing the file.

ISSUE:

Was the Grievant, Sheila Dixon, discharged for just cause? if not, what is the remedy?

BACKGROUND:

The facts in the instant case are not in dispute. The Company manufactures hardwood flooring at its Center, Texas, facility. The Grievant was employed by the Company on February 17, 1981, and at

the time of her discharge on January 14, 1995, was working on a production line as a Dryer Tailer/Grader in the Veneer Department.

During her tenure with the Company, the Grievant served as a Shop Steward. She had received oral warnings for minor violations of Company work rules over the years, but never received further progressive discipline until her discharge.

When she arrived home from work on Thursday, January 12, 1995, she discovered that her electricity had been turned off. Since she did not have the money to pay the bill the first thing the following day, she had to wait until she was paid. She was paid at lunch time on Friday, January 13, 1995, and decided to pay the electric bill after she got off work.

During her morning break on January 13, 1995, the Grievant called the Electric Company. She was informed that the bill must be paid no later than noon that day in order for the power to be turned back on for the weekend. She then went to her supervisor, Mr. Gary Henderson, at about 11:00 AM and requested time off for personal reasons. She requested about one hour off to take care of personal business.

When Mr. Henderson pressed her for more details, she told him that she needed to take her daughter her truck so she could use it to take her daughter to the doctor. She stated that her daughter would drive

her back to work. Mr. Henderson advised the Grievant that he would look into the matter and get back to her.

Shortly after the Grievant's lunch break, Mr. Henderson advised her that he had received approval to let her off, but that it would be an unexcused absence. According to the Company's published Attendance Policy, the Grievant understood that her time off would be an unexcused absence. The Grievant punched out, left the plant, went to the Electric Company and paid her bill. About forty-five minutes later she returned to work. Upon her return, she was seen driving her truck alone instead of with her daughter. Also, during her absence Mr. Henderson was advised by the Grievant's fellow employees that the reason she gave him for leaving the plant was not, in fact, the truth. Based on these facts, the Company decided that the Grievant had lied about her reasons for wanting time off from work.

On Saturday, January 14, 1995, the Grievant reported for work and discovered that her time card was not in the rack. She then was advised that she had been discharged.

When questioned about her reason for not telling the Company the truth about whey she needed time off from work on January 13, 1995, the Grievant testified that she was: Embarrassed about the situation and; She was concerned, that even if she was honest the Company would not let her off. Because of these concerns, she fabricated her story.

Mr. Henderson conferred with his supervisor, Mr. Larry Pryor, and the personnel Manager, Mr. Charles Chandler, before making a decision. In turn, Mr. Chandler conferred with the Plant Manager, Mr. Fred Burkhardt. Later, during the evening of January 13, 1995, Mr. Chandler advised Mr. Henderson that if the Grievant falsified the reason for getting the time off she was to be terminated the following morning for obtaining a leave from her job under false pretenses. In his Termination Letter, dated 1-14-95, Mr. Henderson stated in part:

> "I told Sheila that she was Terminated, effective, immediately, on the grounds of obtaining a leave from her job under false pretenses."

The instance [sic] grievance was timely filed on 1-16-95, and, as remedy, requests:

> "I want my job back based on an unjust discharge. I want [sic] made whole for the time I am off."

OPINION:

The pertinent provisions of the Collective Bargaining Agreement read:

ARTICLE 4
SENIORITY

* * * * *

Section 6 - Loss of Seniority

A. An employee shall lose all seniority rights under the following circumstances:

1. He resigns.
2. He is discharged for just cause.
3. He is absent from work for three (3) days without informing his immediate supervisor and giving a satisfactory reasons for such absence.
4. He has been laid off and subsequently refuses offered re-employment by the Company or fails to report for work within three (3) days after notification at his last known address or phone number.
5. His layoff extends for more than one (1) year.
6. He does not return to work after expiration of an approved leave of absence as set forth in Article 6, Section 3(c).
7. He obtains leave of absence under false pretenses.
8. He takes employment elsewhere during a leave of absence, without express prior written approval from the Company.

B. An employee possessing seniority rights under this Agreement who accepts

a position outside of the bargaining unit shall hold such seniority rights as he has accrued up to the time of his transfer. In the event such employee is returned to the bargaining unit, he shall be able to exercise such accrued seniority in accordance with Section 5 of this Article.

Such employee will not be required to withdraw his membership from the Union. However, he may request and be granted honorary withdrawal from the Union in accordance with its Constitution and Bylaws."

ARTICLE 24
DISCHARGE AND DISCIPLINE

Section 1

It is acknowledged that the company has the right and duty to maintain discipline, including the enforcement of safety and other plant rules, since it is responsible for the efficient operation of the business. The Company expressly has the right to discipline and discharge employees for just cause.

Section 2

The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less sever [sic] discipline.

(a) An employee will be discharge [sic] immediately without prior warning for the following or similar reasons:

(1) Smoking in non-smoking areas.
(2) Negligent damage to property of the company or of another employee.
(3) Disorderly conduct.
(4) Serious violation of safety rules or instructions.
(5) Participating in or originating practical jokes or pranks which might result in serious accidents.
(6) Sleeping on duty.
(7) Reporting for work under the influence of or bringing intoxicants or narcotics into the plant or their use or consumption in the plant, or reporting for work in a physical condition making it unsafe for the employee or other employees.
(8) Being insubordinate or disobedient.
(9) Intentional damage to property of the Company or an employee.
(10) Offering or taking a bribe of any kind in connection with work.
(11) Sabotage.
(12) Absent for three (3) consecutive working days

without notifying the Company.

(13) Being the aggressor in a fight on company property.

(14) Theft of property of the company or any employee.

(15) Punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports.

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

(17) Refusal to permit inspection by plant guards of objects brought into or taken out of the plant.

(18) Failure or refusal to do assigned work.

(19) Possession of firearms, weapons or explosives on Company property.

(20) Leaving the plant or leaving the employee's assigned work area during working time without the permission of the department supervisor (working time does not include the unpaid lunch break).

Any employee who is suspected of violating a rule for which the penalty is immediate discharge may be suspended

without pay pending investigation of the circumstances. In the event the employee is found to be totally innocent of any offense he or she will be reinstated with pay.

(b) An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism.
(2) Tardiness.
(3) Inefficiency or poor work performance.
(4) Abuse of rest periods and lunch periods.
(5) Neglecting duty or failing to maintain work standards.

Section 3

In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:

(a) Verbal warning with written record of warning for the first incident.
(b) Written warning for the second incident.
(c) Disciplinary suspension of three(3) unpaid days for the third incident.
(d) Discharge for the fourth incident.

In agreeing to the foregoing, however, the Company does not intend to waive the exercise of its right to discipline or discharge without following such order in

any case where it determines that the seriousness of the particular offense involved warrants discipline of a different order.

Section 4

The employee shall be informed of the disciplinary action within five (5) working days after the violation is known to the Company.

Section 5

All disciplinary action taken by the Company shall remain in effect and be retained in an employee's file for a period of twelve (12) months. Such disciplinary action will not thereafter be considered in implementing further progressive disciplinary action.

Section 6

The Company retains the unlimited right to promulgate, revise or modify plant safety and work rules governing order and discipline in the plant. Said rules will not become effective until the Company has discussed these rules or changes thereto with the local Union President and/or the Chief Steward and the rules have been posted on the bulletin boards for a period of five (5) working days. If the Union does not agree with the reasonableness of the rules or changes, it shall have five (5) working days from the date of the meeting with the Company to protest any possible enforcement by filing a grievance specifying the rules if it [sic] believes to be unreasonable. Failure to file a timely grievance within the said five(5) day period will constitute a waiver of any

right to challenge the reasonableness of the rule thereafter.

Section 7

In the event the Company suspends an employee prior to quitting time that day will be counted as the first day of suspension."

The Company, in their apparent "rush to judgment", concluded that the Grievant's conduct violated the terms of the Collective Bargaining Agreement, and; that they had "just cause" for terminating her.

Arbitrable standards for just cause discharge were established long ago by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359, 363-65 (1966). In concise form these criteria are as follows:

1. The employee must be forewarned.
2. Employer's position with respect to employee's conduct was reasonable.
3. Employer investigated before discharge.
4. Investigation was fair.
5. Substantial evidence supports the charge against the employee.
6. There was no discrimination.
7. The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

Misco, Inc., 89 LA 137, 144 (Fox 1983).

In Misco, Inc., as in numerous preceding awards, the Arbitrator relied upon those criteria in sustaining a grievant's challenge to discharge on just cause grounds. The Misco, Inc., award was enforced by the United States Supreme Court in United Paperworker's International Union v. Misco, Inc., 484 U.S. 29 (1987). A "no" answer to anyone [sic] or more of the above criteria means just cause for discharge did not exist. Enterprise Wire Co., 46 LA at 362. A single "no" answer means that the Company's decision "contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action.....[and] constituted an abuse of managerial discretion warranting the Arbitrator to substitute his judgement [sic] for that of the employer." Id. at 363. The Union maintains that the instant record warrants a "no" answer to one or more of the above criteria. Therefore, the Grievant was not discharged for just cause and should be reinstated, and made whole.

The Company's position that the Grievant's conduct violated the current Collective Bargaining Agreement, especially Article 4, Section 6(7), is, to say the least, "unreasonable". [sic] The same applies to the Company's attempt to apply Article 24, Section 2(15 & 16).

The Grievant's conduct was into such that demands the supreme industrial penalty of immediate discharge. The

Company wrongfully attempted to apply the referenced provisions of the Collective Bargaining Agreement to the Grievant's conduct. The parties negotiated a progressive discipline policy which the Company failed to follow.

Certainly, the Grievant was guilty of using poor judgment [sic]. The Union president, Mr. Howard McClung, testified that he was not aware of any other employee that has been discharged for the same reasons as the Grievant. He testified that he was not aware that employees could be discharged for being dishonest when verbally requesting time off from work. Also, he testified that he asked Company management: "If the Grievant had been honest, would they have let her off?" The Company's answer was "no". [sic]

Considering the evidence adduced at the arbitration hearing, and considering the presentations made by the parties in their post hearing briefs, the Arbitrator has adequate reason to substitute his judgment [sic] for that of Company's management.

The discipline imposed is reduced to a ten (10) working day suspension.

AWARD

The discipline imposed is reduced to a ten (10) working days suspension. The Grievant is to be returned to her former position with full seniority and all other rights, that she is entitled to under the

terms of the Collective Bargaining Agreement. The Grievant is to be made whole for any loss in excess of the ten (10) working day suspension.

The Union's request for interest on the back pay is denied.

s/Don J. Harr, Arbitrator

Dated at Oklahoma City, Oklahoma, on August 1, 1995.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

FILED
U.S. District Court
Eastern District of Texas

February 21, 1996

David J. Maland, Clerk
By Deputy s/Barbara S. Th__

BRUCE HARDWOOD FLOORS, a division of Triangle Pacific Corp.	§	
V.	§	CIVIL ACTION NO.9:95CV295
UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2714	§	
	§	

MEMORANDUM AND ORDER

Before the Court are the Motions for Summary judgment filed by both parties in this case. For reasons given below, the Court finds that he Motion for Summary judgment to enforce the arbitrator's award is well taken and should be GRANTED while the motion by Bruce Hardwood Floors for Summary Judgment to vacate the arbitrator's award should be DENIED.

BACKGROUND

On August 24, 1995, Plaintiff, Bruce Hardwood Floors, a division of Triangle Pacific Corporation ("Bruce") filed a

complaint seeking to vacate an arbitrator's award. It was assigned cause number 9:95 CV 295. On August 28, 1995, the Defendant UBC, Southern Council of Industrial Workers ("UBC"), filed an action to enforce the same arbitrator's award. That case was assigned cause number 9:95 CV 309. On October 13, 1995, the Court granted the motion to consolidate 9:95 CV 309 into 9:95 CV 295 for all purposes.

The dispute arises out of the following facts, which are undisputed. Bruce is a company that manufactures hardwood flooring at its facility in Center, Texas. Former employee, Sheila Dixon, was employed by Bruce from February 17, 1981, until the time of her discharge on January 14, 1995. This discharge was the basis for the grievance filed and submitted for arbitration under the agreement between Bruce and UBC, which was in effect during the relevant time. During her employment at Bruce, Ms. dixon had served as Shop Steward and had received only oral warnings for minor violations of company work rules over the years. She had never received any further progressive discipline until her discharge.

When returning home from work on Thursday, January 12, 1995, Ms. Dixon discovered that her electricity had been turned off. She had no money to pay the bill but was to be paid the next day at lunch time. She decided she would pay the bill after work the next day, Friday.

During her morning break on Friday, Ms.

Dixon called the electric company and was told that she had to pay the bill by noon that day or her electricity would not be turned on for that weekend. Ms. Dixon then approached her supervisor, Mr. Henderson, at about 11:00 a.m. and requested to take time some time off for personal reasons. She requested one hour off to take care of personal business. When Mr. Henderson pressed for more details, Ms. Dixon told him she needed to take her daughter her truck so she could use it to take her daughter to the doctor. She stated that her daughter would drive her back to work. Mr. Henderson advised Ms. Dixon that he would look into the matter and get back to her. Shortly after her lunch break, Mr. Henderson advised her that he had received approval to let her off, but it would be an unexcused absence. Ms. Dixon punched out, went to pay her electric bill, and returned to work about 45 minutes later. Upon her return, she was observed driving her truck rather than her daughter. Fellow employees had advised Henderson during her absence that she had not given the true reason for needing to leave work.

The next day, Saturday, January 14, 1995, when Ms. Dixon reported to work, she discovered that her time card was not in the rack. She was then advised that she had been discharged. When questioned about her reason for not telling the company the truth about her reason for needing time off from work, she said she was embarrassed by the situation and she was concerned that had she given the true reason, she might not have been let off.

After conferring with his superiors, Mr. Henderson terminated Ms. Dixon, effective immediately, on the grounds of obtaining leave from her job under false pretenses.

Ms. Dixon filed a grievance, based upon an unjust discharge, requesting her job back and to be made whole for her time off.

Pursuant to the collective bargaining agreement, the grievance was arbitrated on April 19, 1995, by Arbitrator Don J. Harr. The parties stipulated that the grievance was subject to arbitration. The issue before the Arbitrator was "Was the Grievant, Sheila Dixon, discharged for just cause? If not, what is the remedy?"

On August 1, 1995, Arbitrator Harr's Award was rendered that the Award was: "The discipline imposed is reduced to a ten (10) working day suspension. The grievant is to be returned to her former position with full seniority and all other rights, (sic) that she is entitled to under the terms of the collective bargaining agreement. The Grievant is to be made whole for any loss in excess of the ten (10) working days suspension. ***The Union's request for interest on the back pay is denied."[1] The Arbitrator found that the company's position that Grievant's conduct violated the current Collective Bargaining Agreement was "unreasonable." Specifically and in particular, the Arbitrator found that the

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[1] Defendant's Exhibit No.2,pages 8 & 9.

company's attempt to characterize Grievant's behavior as violating Article 4, Section 6(7) and Article 24, Section 2(15 & 16), is "to say the least, 'unreasonable'." The Arbitrator found the Grievant "was guilty of using poor judgment."

The company has refused to comply with the Arbitration Award and reinstated Ms. Dixon.

SUMMARY JUDGMENT

Summary judgment is appropriate when the movant is able to demonstrate that the pleadings, affidavits and other evidence available to the Court establish that the are no genuine issues of material fact. Fed.R.Civ.P. 56(c); see generally 10 & 10A Wright, Miller & Kane, Federal Practice and Procedure I 2711-2742. The current standards for reviewing a motion for summary judgment were established by the U.S. Supreme Court's 1986 trilogy of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

DISCUSSION

The courts have limited power to review arbitration awards. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to

accept." *United Paperworkers International v. Misco*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 91987). So long as the arbitrator's award "draws its essence from the collective bargaining agreement" and is not merely "his own brand of industrial justice," the award is legitimate. *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960).

The only relevant factual inquires (sic) in a case involving the enforcement of an arbitrator's award drew its essence from the collective bargaining agreement. *Int'l Association of Machinists and Aerospace Workers v. Texas Steel Co.*, 538 F.2d 116, 119 (5th Cir. 1976), *cert. denied* 429 U.S. 1095 (1977).

The parties stipulate that the dispute was arbitrable. However, Plaintiff contends that the arbitrator exceeded his authority and rendered an award which was outside the essence of the collective bargaining agreement and was implementing "his own brand of industrial justice." Bruce further contends that the finding by the arbitrator that Ms. Dixon exercised poor judgment is tantamount to a finding of dishonestly (sic) which is just cause for immediate dismissal pursuant to Article 24, Section 1 of the agreement which provides that "[t]he Company expressly has the right to discipline and discharge employees for just cause."

The Court has reviewed the collective bargaining agreement in question and notes that ARticle 9, Section 2 provides, in

part, that [t]he written decision of the arbitrator shall be final and binding on all parties." Article 1 recognizes the Company's responsibility and right to discharge for just cause.

The Court notes, that the agreement provides for a progressive discipline procedure for various infractions, such as tardiness, and enumerates the offenses for which immediate discharge, without prior warning, will be the penalty. Article 24 "DISCHARGE AND DISCIPLINE" states as follows: "An employee will be discharged immediately without prior warning for the following *or similar*reasons." (Emphasis added.) Then twenty specific infractions are listed, such as (4) "serious violation of safety rules or instructions" or (13) "being the aggressor in a fight on company property." In these enumerated offenses are (15) "punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports and (16) "stealing, immoral conduct, or any action the Company premises intended to destroy property or inflict bodily injury." At arbitration, Bruce took the position that Grievant's conduct violation (15) and (16). Bruce also took the position that the conduct justified immediate loss of seniority under Article 4, Section 6(7) of the collective bargaining agreement which punishes one who "obtains leave of absence under false pretenses." A leave of absence, while not precisely defined, however, is referred to as being of a duration of two weeks or six weeks and is not a matter of minutes.

After review of the agreement and the arbitrator's award, the Court is satisfied that the arbitrator confined his decision and remedy to the interpretation and application of the collective bargaining agreement. He did provide an award which was within the essence of the collective bargaining agreement. The Court agrees with the ARbitrator that Plaintiff's position that Ms. Dixon's conduct violated Article 4, Section 6(7) and Article 24, Section 2(15 & 16) was unreasonable.

ATTORNEY'S FEES

The Fifth Circuit has authorized the award of attorney's fees where it is determined that a party has refused to abide by an arbitration award without justification. *Int'l Ass. of Machinists v. Texas Steel Co.*, 639 F.2d 279 (5th Cir. 1981). The Court finds that the refusal of Bruce Hardwood Floors to abide by the arbitration award in this case was without justification.

Based upon the foregoing,

IT IS ORDERED the Plaintiff's Motion for Summary Judgment to vacate Arbitrators Award is DENIED in all things.

IT IS ORDERED that Defendant's Motion for Summary Judgment is GRANTED in all things.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff, Bruce Hardwood Floors, a Division of Triangle Pacific

Corporation, abide by the remedy set out in the Award of Arbitrator Don J. Harr, returning Grievant, Sheila Dixon, to her former position with full seniority and all other rights that she is entitled to under the terms of the collective bargaining agreement, and making her whole for any losses over the ten (10) working day suspension;

IT IS FURTHER ORDERED that Plaintiff pay Defendant for reasonable attorney's fees in prosecuting this action.

SIGNED this 20th day of February, 1996.

s/ JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BRUCE HARDWOOD FLOORS, a DIVISION OF TRIANGLE PACIFIC CORPORATION	§	
Employer,	§	
VS.	§	CIVIL ACTION NO. CA9:95-CV-295
UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,	§	
Union.	§	

JUDGMENT

Pursuant to the Court's Memorandum and Order granting Defendant UBC, Southern Council of Industrial Workers, Local Union No. 2713's Motion for Summary judgment, and overruling Plaintiff's Motion for Summary Judgment, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff Bruce Hardwood Floors, a division of Triangle Pacific Corp., abide by the Award of Arbitrator Don J. Harr, dated August 1, 1995, returning Grievant Sheila Dixon, to her former position with full seniority and all other rights that she is entitled to under the terms of the collective bargaining agreement, making her whole for any losses over the ten (10) working day suspension;

IT IS FURTHER ORDERED that Plaintiff pay Defendant UBC, Southern Council of Industrial Workers, Local 2713, reasonable attorney's fees in the amount of $4,578.67,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is to draw interest at the current legal rate of 4.89%, beginning on the thirty-first day after Judgment was entered.

SIGNED THIS 20 day of March, 1996.

s/JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

BRUCE HARDWOOD FLOORS v. UBC, INDUS. WORK.

NO. 2713

BRUCE HARDWOOD FLOORS, DIVISION OF TRIANGLE PACIFIC CORPORATION, Plaintiff-Appellant,

v.

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713, Defendant-Appellee.

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713, Plaintiff-Appellee,

v.

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION, Defendant-Appellant.

No. 96-40279.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1997.

Appeal from the United States District Court for the Eastern District of Texas.

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiff Bruce Hardwood Floors ("Bruce") appeals the district court's grant of summary judgment enforcing an arbitration award in favor of Defendant UBC, Southern Council of Industrial Workers, Local Union No. 2713 ("the Union") and the court's award of attorneys' fees to the Union. We reverse the district court's decisions on both issues.

I

Sheila Dixon, a Dryer Tailer/Grader on a production line in Bruce's Veneer Department, asked her supervisor for leave from work to take her truck to her daughter who needed it to go to the doctor. Dixon's supervisor approved her request. However, while Dixon was absent from work, other employees informed her supervisor that Dixon actually needed the time off to pay an overdue electric bill. When questioned by her supervisor the next day about her reasons for needing the absence from work, Dixon admitted that she had fabricated the story about her daughter's doctor appointment. After conferring

with his own supervisor, the plant's personnel manager, and the plant manager, Dixon's supervisor discharged Dixon for obtaining the time off from work under false pretenses.

Dixon thereafter filed a grievance contesting her termination. Her grievance was processed in accordance with the four-step procedure in the parties' collective bargaining agreement ("CBA"). When Dixon's termination could not be resolved through the grievance procedure, the Union submitted the dispute to arbitration.

The arbitrator held that Bruce should have applied progressive discipline provisions of the CBA, rather than discharge provisions.[1]

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1. The pertinent discharge and progressive discipline provisions of the CBA are as follows:

Article 24, Section 2. The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less severe discipline.

(a) An employee will be discharged immediately without prior warning for the following or similar reasons:

He concluded that Bruce's contention that Dixon's conduct warranted discharge under the CBA was "unreasonable," but

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. . . . . .

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

. . . . . .

(b) An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism. (3) Inefficiency or poor work performance.

(2) Tardiness. (4) Abuse of rest periods and lunch periods.

(5) Neglecting duty or failing to maintain work standards.

Section 3. In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:

(a) Verbal warning with written record of warning for the first incident.

(b) Written warning for the second incident.

(c) Disciplinary suspension of three (3) unpaid days for the third incident.

(d) Discharge for the fourth incident.

In agreeing to the foregoing, however, the Company does not intend to waive the exercise of its right to discipline or discharge without following such order in any case where it determines that the seriousness of the particular offense involved warrants discipline of a different order.

found that Dixon had "fabricated her story."[2] The arbitrator reinstated Dixon with full seniority and back pay and imposed a ten-day suspension from work.

Bruce then filed a complaint in district court seeking vacatur of the arbitration award. The Union subsequently filed a complaint seeking enforcement of the award. The district court consolidated the actions and the parties filed cross-motions for summary judgment. The district court granted the Union's motion and denied Bruce's motion,

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2. Specifically, the arbitrator concluded:

> The Grievant's conduct was not such that demands the supreme industrial penalty of immediate discharge. The Company wrongfully attempted to apply the referenced provisions of the Collective Bargaining Agreement to the Grievant's conduct. The parties negotiated a progressive discipline policy which the Company failed to follow.
>
> Considering the evidence adduced at the arbitration hearing, and considering the presentations made by the parties in their post hearing briefs, the Arbitrator has adequate reason to substitute his judgement [sic] for that of Company's management.

thereby enforcing the arbitration award.[3] The district court also awarded the Union attorneys' fees. Bruce appeals.

II

[1,2] Bruce argues that the arbitrator improperly ignored the terms of the parties' CBA and that the district court should therefore have vacated the arbitration award. Where a party appeals a grant of summary judgment in a suit to vacate an arbitration award, we review the district court's ruling *de novo*. *Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66,* 71 F.3d 179, 181 (5th Cir. 1995), *cert. denied*, -----U.S.------, 117 S.Ct. 52, 136 L.Ed.2d 16 (1996). As long as the arbitrator's decision draws its essence from the collective bargaining agreement and the arbitrator is not fashioning his own brand of industrial justice,

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3. In granting the Union's motion for summary judgment to enforce the arbitration award, the district court found that "the arbitrator confined his decision and remedy to the interpretation and application of the collective bargaining agreement" and that the arbitrator "provide[d] an award which was within the essence of the collective bargaining agreement."

we will decline to vacate the award. *Id.* at 182. In applying the "essence" test, we have stated that an arbitration award "must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract." *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir.1994) (citation omitted).

[3,4] Although we accord an arbitrator's decision considerable deference regarding the merits of the controversy, the CBA circumscribes his jurisdiction. *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir.1989), *cert. denied*, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). Where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference ends and vacatur or modification of the award is an appropriate remedy. *Id.*

[5] After reviewing both the CBA and the arbitration

award, we conclude that the award is not "derived from the wording or purpose of the contract." *Executone*, 26 F.3d at 1325. Article 9, § 3 of the CBA binds an arbitrator to the terms of the contract. *See id.* ("No arbitrator shall have authority to add to, amend or depart from the terms of this written Agreement. . . ."). The arbitrator found, based on Dixon's own admission, that Dixon lied to obtain time off from work. Lying is specifically covered by Article 24, § 2(a) of the CBA, which states that an employee will be discharged immediately for engaging in immoral conduct.[4] In refusing to apply this provision, the arbitrator exceeded the express limitations of his contractual mandate.[5]

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4. The dissent criticizes us for interpreting the term "immoral conduct." We do not. By definition, lying is immoral conduct--that is, it is inconsistent with principles of morality. *See* BLACK'S LAW DICTIONARY 751 (6th Ed.1990).

5. The arbitrator concluded that Bruce should have applied the CBA's progressive discipline policy to Dixon's conduct, but did not specify which of the five enumerated progressive discipline offenses incorporated Dixon's lie. Likewise,

[6] The arbitration award is further undermined by the penalty imposed. Nowhere does the CBA provide for a penalty of a ten-day suspension from work. Although the Supreme Court has stated that "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct," *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364, 373, 98 L.Ed.2d 286 (1987), the Court clarified that "[t]he parties, of course, may limit the discretion of the arbitrator in this respect. . . ." *Id.* By so doing, it is possible to vest in the employer complete

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though the Union urges that Dixon's conduct deserves progressive discipline because it is similar tot he listed progressive discipline offenses, it also fails to specify which of the offences implicates lying. For our part, we discern no similarity between lying and absenteeism, tardiness, inefficiency or poor work performance, abuse of rest periods and lunch periods, or neglect of duty or failure to maintain work standards. The plain language of the progressive discipline policy simply does not support a finding that the policy applies to lying, particularly in light of the clear applicability of the discharge provisions to Dixon's conduct.

discretion over terminations which the arbitrator is not free to usurp. *Delta Queen*, 889 F.2d at 602.

As noted, the CBA in this case prohibits an arbitrator from adding to, amending or departing from the terms of the agreement. Hence, once the arbitrator found that Dixon fabricated her story, he was bound to impose the penalty provided by the CBA for that conduct. *See Delta Queen*, 889 F.2d at 604 ("If a collective bargaining agreement defines 'proper cause' to include a non-exhaustive list of offenses, an arbitrator cannot ignore the natural consequence of his finding that a listed offense was committed."). In fashioning a remedy not contained in the CBA, despite finding that Dixon committed an offense covered by the CBA, the arbitrator exceeded his contractual authority by adding to, amending and/or departing from the terms of the agreement. As a result, we vacate the arbitration award. *See Houston Lighting & Power Co.*, 71 F.3d at 179 ("[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitrar action contrary to

express contractual provisions will not be respected."). Thus, we reverse the district court's grant of summary judgment in favor of the Union and reinstate Dixon's discharge. *See Container Prods., Inc. v. United Steelworkers of Am., and its Local 5651*, 873 F.2d 818, 820 (5th Cir.1989) (affirming district court order vacating remedy imposed by arbitrator and reinstating discharge).

III

[7-9] Bruce also contends that the district court abused its discretion in awarding the Union attorneys' fees. We review an award of attorneys' fees for an abuse of discretion. *International Union of Elec., Radio and Mach. Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 893 (5th Cir.1983), *cert. denied*, 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed.2d 184 (1984). An award of attorneys' fees is permitted when a party has refused to abide by an arbitration decision "without justification." *International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co. ("Texas Steel II")*, 639

F.2d 279, 283 (5th Cir. 1981).

Because we have concluded that the arbitrator exceeded his contractual authority, we do not find that Bruce's refusal to abide by the arbitration decision was without justification. *See id.* at 283-84 (explaining that in cases where arbitration award exceeds power conferred upon arbitrator, challenge is proper and not without justification). Hence, we reverse the district court's award of attorneys' fees to the Union.

IV

For the foregoing reasons, we REVERSE the district court's grant of summary judgment in favor of the Union, VACATE the arbitration award and reinstate Dixon's discharge. In addition, we REVERSE the district court's award of attorneys' fees to the Union.

BENAVIDES, Circuit Judge, dissenting:

I dissent. The majority substitutes its own interpretation of the collective bargaining agreement ("CBA") for the arbitrator's interpretation. In doing so, it disregards

fundamental Supreme Court precedent setting forth the deferential standard for reviewing arbitration awards. An arbitration award can be overturned only if it fails to draw its essence from the collective bargaining agreement. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). A corollary of this principle is that we cannot overturn an arbitration award even if "the arbitrator misread the contract." *United Paperworkers Int'l Union AFL--CIO v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38-39, 108 S.Ct. At 371.

The arbitrator in this case construed the CBA in light of the evidence before him and determined that the company's decision to terminate Dixon involved an unreasonable

construction of the CBA and that the company should have imposed progressive discipline instead. The arbitrator's conclusions are rationally inferable from the CBA. No more is required. Accordingly, I would affirm the judgment of the district court upholding the award.

The facts before the arbitrator are somewhat more textured than the court's opinion reflects. Dixon's termination arose from an unpaid 45-minute absence from work. Her electricity had been turned off because she had failed to pay her bill. She planned to pay the bill at the end of the work day on Friday, after she received her paycheck. But during her morning break that day, she discovered that unless she paid the bill by noon, she would have no electricity for the entire weekend. That morning, she asked her supervisor, Gary Henderson, for an hour off for a personal reason. Henderson demanded details about why she needed the time. Instead of telling him the undoubtedly embarrassing truth (that her electricity had been shut off because she had failed to pay her

bill), she told him that she needed to take her truck to her daughter who had a doctor's appointment. Henderson told her that she could leave, but that it would be an "unexcused absence." She clocked out, went to pay the electricity bill, and returned within 45 minutes. In the meantime, Dixon's co-workers told her supervisor that she had fabricated the reason for leaving work. When Dixon returned to work the next day, her time card was missing, and she was told that she had been discharged. At the time of Dixon's discharge, the company stated that it was terminating her for obtaining a leave of absence under false pretenses.[6]

Neither the CBA's list of dischargeable offenses nor the list of offenses for which progressive discipline will be

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6. "Obtaining a leave of absence under false pretense" is not listed as a dischargeable offense under the CBA, but rather as a ground for loss of seniority. Thus, the arbitrator reasonably concluded that the reason for termination given by the company at the time of Dixon's discharge did not provide just cause for her termination. Although the company continues on appeal to assert this as a just cause for termination the majority does not rest its opinion on this provision.

imposed specifically covers Dixon's misconduct. Both lists are non-exhaustive and allow punishment of "similar offenses" under their terms. It was the arbitrator's task to determine whether her conduct was more closely analogous to a dischargeable offense or a progressive discipline offense. The arbitrator evidently decided that Dixon's misconduct in fabricating a story to get a 45-minute unpaid break to pay her electricity bill was more akin to a progressive discipline offense, such as absenteeism or "abuse of rest period and lunch periods," than to any dischargeable offense under the CBA. Thus, the arbitrator determined that the company should have followed its progressive discipline policy rather than discharging Dixon. In reaching this conclusion, the arbitrator necessarily interpreted the CBA. It is not our business to overturn that interpretation, even if we would have decided the matter differently.

The arbitrator concluded that the company's attempt to characterize Dixon's conduct as "immoral conduct" within the

meaning of Article 24, Section 2(a)(16) of the CBA was unreasonable. That section allows the company to terminate employees immediately for "stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury." The majority erroneously states that "lying" is "specifically covered" by this provision and conc ludes that this provision is dispositive. Lying is not, however, specifically listed in this provision, nor is immoral conduct expressly defined by the CBA to include lying. Instead the majority's conclusion requires an inferential step, that any lie is "immoral conduct" justifying immediate termination within the meaning of the CBA. In other words, the majority *interprets* the term "immoral conduct" and comes to a conclusion different from that reached by the arbitrator. That is not the court's proper role. In reviewing the arbitrator's construction of the phrase "immoral conduct," the issue is not what we believe to be moral or immoral conduct in the philosophical sense. The issue before the arbitrator was whether Dixon's conduct rose to

the level of "immoral conduct" as that term is used in the CBA.

The arbitrator evidently concluded that Dixon's fabrication, though it demonstrated "poor judgment," did not rise to the level of "immoral conduct" within the meaning of this offense. An arbitrator has discretion to decide whether particular conduct constitutes a dischargeable offense within the meaning of a CBA, as the First Circuit aptly explained in *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir.1988) (holding that where the arbitrator found that an employee committed an offense listed as a ground for discharge, he lacked discretion to order the employee's reinstatement). The CBA in *Georgia-Pacific* provided that "dishonesty" was an offense for which an employee could be discharged. *Id.* at 945. As the court explained, "It is . . . up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty. For example, an arbitrator may decide that stealing a company pencil does not amount to dishonesty for purposes of immediate discharge." *Id.*

at 945 n. 2. Similarly, in this case, it was up to the arbitrator to decide whether Dixon's conduct rose to the level of "immoral conduct" for the purposes of immediate discharge. I fail to see how the arbitrator could be compelled to find that Dixon's action was immoral conduct, especially when the CBA itself specifically lists "obtaining a leave of absence under false pretenses" as a ground for loss of seniority, but not as a ground for discharge.

The arbitrator's apparent interpretation of "immoral conduct" also draws support from the context in which the phrase appears. It is a fundamental canon of construction that a word is known by its company. Applying this principle, "immoral conduct" should be construed in relation to the other offenses listed with it in Section 2(a)(16): "stealing" and "any act on the Company premises intended to destroy property or inflict bodily injury." The arbitrator could have concluded that immoral conduct in this context does not encompass any act that violates the Golden Rule, but only conduct that rises to the

serious level of stealing or intentional infliction of property damage or personal injury. Although this court may not agree with the arbitrator's interpretation and indeed may be convinced that the interpretation was a "serious error," it may not overturn the award simply because it disagrees.

The company and the court rely heavily on *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir.1989), *cert. denied*, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). This case is easily distinguished from *Delta Queen*. In that case, the CBA expressly listed "carelessness" as a ground for discharge, and the arbitrator expressly found that the discharged riverboat captain was "grossly careless." *Id.* at 601. In that circumstance, we held that the arbitrator, having found that the riverboat captain had committed a dischargeable offense, was not free to ignore the terms of the CBA. If the arbitrator in this case had made an express finding that Dixon engaged in immoral conduct, then, of course, he could not ignore the terms of

Article 24, Section 2, which makes immoral conduct a dischargeable offense. But he made no such finding.

The majority further suggests that the fact that the remedy imposed by the arbitrator, a ten-day suspension, is not provided for by the CBA agreement somehow undermines the arbitrator's decision that the company lacked just cause to terminate Dixon. But appropriate discipline for the offense is a distinct question from whether the termination was with just cause. The parties' submission of two questions to the arbitrator ("Was the Grievant, Sheila Dixon, discharged for just cause? If not, what is the remedy?") underscores the separateness of the two inquiries. That the arbitrator imposed a harsher punishment on Dixon than would be available to the company under the CBA does not undermine the arbitrator's decision on the termination question. Further, it is difficult to see how the company can complain of the imposition of a punishment more severe than that which it would have been able to impose under the CBA's progressive discipline policy.

A three-day unpaid suspension is the most severe progressive discipline provided for by the CBA, short of termination. At oral argument, the company in essence conceded that if it lacked just cause to terminate Dixon, it does not seek a remand for the purpose of imposing a lesser punishment on Dixon under the CBA's progressive discipline policy.

The arbitrator was charged with deciding whether the company had just cause to discharge Dixon. To do so, he had to evaluate Dixon's particular conduct and determine whether that conduct fell within the CBA's discharge provision. He concluded that, plotted on a spectrum of bad behavior, Dixon's actions fell closer to absenteeism or abuse of a rest period than to stealing, immoral conduct, or intentional infliction of personal injury or property damage. Unlike the majority, I would not overturn the arbitrator's decision merely because I do not agree with its outcome. Clearly, his decision drew its essence from the CBA. I would affirm the judgment of the district court, including the award of attorney's fees. *See*

International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co., 639 F.2d 279, 283 (5th Cir. Unit A 1981). The district court did not clearly err in concluding that the company's challenge to the arbitrator's award was "without justification."

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-40279

BRUCE HARDWOOD FLOORS, Division of Triangle Pacific Corporation
Plaintiff-Appellant

v.

UBC, Southern Council of Industrial Workers, Local Union No. 2713
Defendant-Appellee

****

UBC, Southern Council of Industrial Workers, Local Union No. 2713

Plaintiff-Appellee

v.

Bruce Hardwood Floors, A Division of Triangle Pacific Corporation

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Lufkin

ON PETITION FOR REHEARING

Before BARKSDALE, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT

s/Emilio M. Garza
United States Circuit Judge

APPENDIX E

LABOR AGREEMENT
by and between
BRUCE
HARDWOOD FLOORS
A Triangle Pacific Company
Center, Texas

and

LOCAL UNION 2713
SOUTHERN COUNCIL OF INDUSTRIAL WORKERS

chartered by

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

for the period:
November 1, 1993
through
November 2, 1997

ARTICLE 4
SENIORITY

***

Section 6 Loss of Seniority A. An employee shall lose all seniority rights under the following circumstances:

1. He resigns.
2. He is discharged for just cause.
3. He is absent from work for three (3) days without informing his immediate supervisor and giving a satisfactory reason for such absence.
4. He has been laid off and subsequently refuses offered re-employment by the Company or fails to report for work within three (3) days after notification at his last known address or phone number.
5. His layoff extends for more than one (1) year.
6. He does not return to work after expiration of an approved leave of absence as set forth in Article 6, Section 3(c).
7. He obtains a leave of absence under false pretenses.
8. He takes employment elsewhere during a leave of absence, without express prior written approval from the Company.

ARTICLE 9
ARBITRATION

***

Section 2 The arbitrator shall conduct

a hearing at which the facts and arguments relating to the dispute shall be heard. The award shall be rendered promptly, and, unless agreed by the parties, not later than thirty (30) calendar days from the date of closing the hearing or the date for filing briefs, whichever is later, and no award shall be retroactive beyond the date on which the grievance occurred. The written decision of the arbitrator shall be final and binding on all parties....

ARTICLE 24
DISCHARGE AND DISCIPLINE

Section 1 It is acknowledged that the company has the right and duty to maintain discipline, including the enforcement of safety and other plant rules, since it is responsible for the efficient operation of the business. The Company expressly has the right to discipline and discharge employees for just cause.

Section 2 The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less severe discipline.

(a)An employee will be discharged immediately without prior warning for the following or similar reasons:

(1) Smoking in non-smoking areas.
(2) Negligent damage to property of the company or of another employee.
(3) Disorderly conduct.

(4) Serious violation of safety rules or instructions.

(5) Participating in or originating practical jokes or pranks which might result in serious accidents.

(6) Sleeping on duty.

(7) Reporting for work under the influence of or bringing intoxicants or narcotics into the plant or their use or consumption in the plant, or reporting for work in a physical condition making it unsafe for the employee or other employees.

(8) Being insubordinate or disobedient.

(9) Intentional damage to property of the Company or an employee.

(10) Offering or taking a bribe of any kind in connection with work.

(11) Sabotage.

(12) Absent for three (3) consecutive working days without notifying the Company.

(13) Being the aggressor in a fight on company property.

(14) Theft of property of the Company or any employee.

(15) Punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports.

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

(17) Refusal to permit inspection by plant guards of objects brought into or taken out of the plant.

(18) Failure or refusal to do assigned work.
(19) Possession of firearms, weapons or explosives on Company property.
(20) Leaving the plant or leaving the employee's assigned work area during working time without the permission of the department supervisor (working time does not include the unpaid lunch break).

Any employee who is suspected of violating a rule for which the penalty is immediate discharge may be suspended without pay pending investigation of the circumstances. In the event the employee is found to be totally innocent of any offense he or she will be reinstated with pay.

(b)An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism.
(2) Tardiness.
(3) Inefficiency or poor work performance.
(4) Abuse of rest periods and lunch periods.
(5) Neglecting duty or failing to maintain work standards.

Section 3 In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:
(a) Verbal warning with written record of warning for the first incident.

(b) Written warning for the second incident.
(c) Disciplinary suspension of three (3) unpaid days for the third incident.
(d) Discharge for the fourth incident.

APPENDIX F

BLACK'S LAW DICTIONARY
WITH PRONUNCIATIONS

SIXTH EDITION

Centennial Edition (1891-1991)

Immoral. Contrary to good morals; inconsistent with the rules ad principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. Morally evil; impure; obscene; unprincipled; vicious; or dissolute. U.S. v. One Book, Entitled "Contraception," by Marie C. Stopes, D.C.N.Y., 51 F.2d 525, 527. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or is wilful, flagrant, or shameless conduct showing moral indifference to opinions of respectable members of the community, and as an inconsiderate attitude toward good order and public welfare. Clarke v. Board of Educ. of School Dist. of Omaha, in State of Neb., 215 Neb. 250, 338 N.W.2d 272, 277. 665. 674

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